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06 UNITED STATES DISTRICT COURT
07 WESTERN DISTRICT OF WASHINGTON
08 AT SEATTLE

09 RICHARD A. KIRKHAM,) CASE NO. C05-1704-JCC-MAT
10 Plaintiff,)
11 v.)
12 JOSEPH CHALVERUS, et al.,) REPORT AND RECOMMENDATION
13 Defendants.)
14)

15 Plaintiff has presented to this Court for filing a civil rights complaint under 42 U.S.C. §
16 1983, and an application to proceed with this action *in forma pauperis*. Plaintiff alleges in his
17 complaint that the attorney who is acting as standby counsel for purposes of plaintiff's state court
18 criminal proceedings has denied plaintiff access to the courts, has lied to plaintiff and mislead him,
19 and has frustrated plaintiff's efforts to prepare a defense. Plaintiff names as defendants in this
20 action Joseph Chalverus, Attorney at Law, and the Law Office of Joseph Chalverus. Plaintiff
seeks compensatory damages for Mr. Chalverus' allegedly unconstitutional conduct.

21 In order to sustain a civil rights action, a plaintiff must show (1) that he suffered a violation
22 of rights protected by the Constitution or created by federal statute, and (2) that the violation was

proximately caused by a person acting under color of state or federal law. *See Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). Neither private attorneys nor public defenders are considered state actors for purposes of bringing suit under § 1983. *See Polk County v. Dodson*, 454 U.S. 312 (1981)(a public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding). Because Mr. Chalverus is a private attorney, plaintiff may not maintain an action against him or his law firm under § 1983.

As it appears from the face of the complaint that the defendants named in this action are not subject to suit under § 1983, this Court recommends that plaintiff's application to proceed *in forma pauperis* be denied and this action be terminated. A proposed Order accompanies this Report and Recommendation.

DATED this 20th day of October, 2005.



Mary Alice Theiler
United States Magistrate Judge